BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JO ELLYN BAKER	)	
Claimant	)	
VS.	)	
	)	Docket No. 245,199
MEDICALODGE OF COLUMBUS	)	
Respondent	)	
AND	)	
	)	
TRAVELERS INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Claimant requested review of the January 17, 2003 Award by Administrative Law Judge (ALJ) Jon L. Frobish. The Appeals Board (Board) heard oral argument on July 8, 2003. Stacy Parkinson of Olathe, Kansas, served as Board Member Pro Tem pursuant to an Order issued by Paula S. Greathouse, Director of the Division of Workers Compensation.[1]

APPEARANCES

Timothy A. Short of Pittsburg, Kansas, appeared for the claimant. Leigh C. Hudson of Fort Scott, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

[1] On March 31, 2003, Gary M. Peterson retired from the Board. But at the time of oral argument a new Board Member had not been appointed. Accordingly, Ms. Parkinson was appointed as Board Member Pro Tem for this claim.

ISSUES

The Administrative Law Judge found claimant sustained a 20 percent functional impairment to the right upper extremity at the level of the shoulder as a result of her March 29, 1999 accident. He determined that claimant's subsequent neck surgery along with the residual paralysis and limited range of movement were unrelated to the earlier work-related injury.

Claimant requests review of this decision, asserting that the evidence establishes that a November 16, 1999 incident and subsequent surgery were directly attributable to her March 29, 1999 accident. As a result, counsel argues claimant is permanently and totally disabled, thus entitled to the maximum benefit of $125,000 as well as past and future medical benefits.

Respondent argues the ALJ's decision should be affirmed in all respects.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

On March 29, 1999, claimant was employed as the director of nurses at respondent's nursing home. While in the process of retrieving some medical records, claimant sustained injury when several large boxes and a printer fell, striking her. The record indicates that the physical injuries claimant experienced immediately following the accident are somewhat inconsistent.

Respondent first referred claimant to Dr. Harrison, an occupational physician. According to claimant, she complained of pain in her upper chest, shoulder blades and shoulder, numbness in the right thumb and right forearm along with general overall complaints of pain. These complaints are all apparently reflected in Dr. Harrison's records. He took her off work beginning March 29, 1999. Dr. Harrison then referred claimant to Dr. Kevin Komes, a physiatrist.

Claimant was seen by Dr. Komes on April 19, 1999, and according to claimant, she told him details of the accident and that both shoulders were injured. She also maintains she told Dr. Komes of her headaches and neck pain following her injury. Dr. Komes' records do not indicate any complaints of headaches but because claimant complained of neck pains, he referred her back to Dr. Harrison for a neck evaluation. In the meantime, the EMG Dr. Komes ordered came back negative.

Claimant returned to see Dr. Harrison on April 22, 1999, and she was then referred on to Dr. John Esch, Jr., an orthopaedic physician, who saw her on May 12, 1999. Again,

claimant discussed the details of her accident and the history of her complaints. She maintains she told Dr. Esch that both her shoulders and neck were injured in the accident. Dr. Esch's records do not reflect these complaints, although he did diagnose a torn rotator cuff on the right side. He recommended surgery and on May 20, 1999, the tear was repaired. Claimant was released to return to work on June 17, 1999, and directed to perform only one-handed duty. She began therapy on June 18, 1999, and was eventually released to full duty without restrictions as of October 21, 1999.[2]

Following this surgery claimant testified that she continued to hurt all over and still experienced headaches and neck pain but that Dr. Esch was not interested in addressing those complaints. In spite of this contention, there is evidence in the record that Dr. Esch did acknowledge claimant's complaints as to her neck and left shoulder.

Dr. Esch's records reveal claimant's complaints of pain in her neck and shoulder on July 15, 1999. This was the first documented complaint of pain to the *left* side, although Dr. Komes noted on April 19, 1999, that claimant was complaining of some intermittent loss of strength in certain positions on the left side. In response to the neck and shoulder complaints, Dr. Esch asked for and received authority from respondent's carrier to evaluate these complaints. He had claimant undergo a MRI, which revealed mild impingement to the left shoulder, and an EMG, which was normal. He provided her with conservative treatment in the form of an injection. Thereafter, his records reveal that claimant's shoulders were improving. There is no further indication that claimant had any further complaints with respect to the neck and left shoulder.

The claimant worked full-time up to November 10, 1999. On November 16, 1999, the claimant was at home when she woke up with what she described as flu symptoms. As the day went on, she continued to feel ill and sat in a chair. She then bent down to adjust a small rug when she experienced significant numbness in her upper extremities. Claimant got up from the chair and after walking a short distance in her home she began to feel lightheaded. A friend came to her aid and took her to the local hospital.

While at Maude Norton Hospital in Columbus, Kansas, claimant voiced a history of pain complaints in her neck and intermittent numbness and tingling in the first three digits of both hands. She was evaluated and transferred to another health facility. At that point, Dr. Nichols performed an anterior cervical discectomy and fusion at C5-6 and C6-7 that same day.

Claimant has not returned to work and, in fact, has been classified by at least one physician as suffering from quadriparesis. She is not a quadriplegic as she has some limited movement of her extremities. Claimant has had to remodel her house to accommodate her wheelchair and has purchased a van that is equipped with a lift. She

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[2] Claimant testified she was released on October 21, 1999. See R.H. Depo. of Claimant at 36.

has not seriously attempted to return to work and, in fact, receives Social Security Disability benefits.

There is little dispute between the parties as to whether claimant sustained a compensable accident to her right shoulder. Dr. Esch was the only physician who was asked to speak to the claimant's functional impairment. Following her release from his care, he opined claimant sustained a 20 percent permanent partial impairment to the right upper extremity at the level of the shoulder pursuant to the *Guides*.[3] The ALJ found this, the only opinion contained within the record, to be persuasive and awarded benefits based upon this 20 percent impairment. The Board finds the ALJ's reasoning to be justified and will not disturb this finding.

Dr. Esch declined to assess any permanency to claimant's left shoulder as he observed a full range of motion and concluded that the left shoulder had only mild impingement symptoms, as confirmed by the MRI, and that her occasional pain complaints did not justify the assignment of any permanency under the *Guides*. Other than this, there is no evidence to establish what, if any, permanency claimant might have sustained to her left shoulder as a result of the March 1999 accident. The Board finds the claimant has failed to meet her burden of proof as it relates to the left shoulder complaints.[4]

There is, however, a very significant dispute between these two litigants as to whether the subsequent neck surgery bears any causal relationship to the March 29, 1999 accident. Dr. Esch was asked to speak to this issue. He testified that at least during the period of time he treated her, claimant did not demonstrate the need for surgery to her neck. He explained that she had no evidence of cervical myelopathy and although she had some symptoms suggestive of cervical radiculopathy, the EMGs eliminated that as a cause. Thus, based upon his treatment and her complaints, Dr. Esch is of the opinion that the surgery that took place in November 1999 was not causally related to the March 29, 1999 accident.

This opinion was echoed by Dr. Timothy Stepp, a board-certified neurosurgeon, who reviewed the records provided by respondent's counsel. When asked to explain the basis of his opinion, Dr. Stepp testified that essentially claimant got hurt in March 1999, received treatment and her condition improved. She bore no signs of cervical radiculopathy or myelopathy that could not otherwise be explained by the fact that she had a torn rotator cuff in her right shoulder. He also pointed to the fact that radiological evidence indicates claimant had pre-existing spinal stenosis back in 1993. Taking all these factors into

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[3] American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.).

[4] This is really an insignificant issue as claimant maintains she is permanently and totally disabled and entitled to the statutory maximum benefit of $125,000.

consideration, Dr. Stepp did not believe that claimant's need for surgery in November 1999 bore any causal relationship to the March 1999 accident.

Claimant was also evaluated by Dr. Bernard Abrams, a neurologist who examined her on March 12, 2001. According to Dr. Abrams, claimant told him an 80-pound box landed across her shoulders and neck and that a box and printer landed upon her right forearm. He further testified claimant told him that she had ongoing problems in her left shoulder and the left side of her neck. Dr. Abrams then testified based upon her description of the events and her symptoms that claimant's pre-existing spinal stenosis was aggravated by the March 1999 accident and that there was a cause and effect relationship between that event and her subsequent need for treatment in November 1999.

Respondent's counsel painstakingly took Dr. Abrams through the medical records in an effort to point out what respondent believed were inconsistencies in the claimant's history of her accident and her ongoing complaints. The most glaring difference between claimant's recitation of her symptoms and that reflected in the records is the fact that the records do not indicate claimant had consistent complaints of numbness and/or pain in her left upper extremity, shoulder or her neck. Dr. Abrams eventually conceded that if he had reviewed the documents only, his opinion would be that claimant's need for surgery in November 1999 was unrelated to her work-related accident.[5]

The ALJ[6] ordered Dr. David K. Ebelke, an orthopaedic surgeon, to conduct an independent medical examination pursuant to K.S.A. 1998 Supp. 44-510e(a). After conducting his examination and reviewing claimant's medical records, including a set of pre-injury x-rays, Dr. Ebelke found no relationship between claimant's work injury and her resulting cervical condition that required surgery in November 1999.

Dr. Ebelke testified that claimant had no symptoms of myelopathy or cervical radiculopathy prior to November 1999. He conceded she had a certain set of complaints but they were not wholly consistent or convincing evidence of either myelopathy or cervical radiculopathy. He further justified his position by referencing the eight-month lapse between the original accident and the acute onset in November 1999. Dr. Ebelke testified that claimant had no disk herniation in March 1999 following her injury. He explained that had claimant actually herniated a disk in her March 1999 accident, she would have developed significant symptoms within a day or two, or possibly as long as a week after the accident. It was simply too long between the accident and the acute onset of her symptoms to believe that the March 1999 accident led to her need for treatment in November 1999. Lastly, Dr. Ebelke testified that even if he took all of claimant's verbal

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[5] Dr. Abrams testified that if he based his opinions solely on the claimant's medical records, he would agree with the opinions of Dr. Ebelke, the independent medical examiner. See Abrams Depo. at 16.

[6] Steven J. Howard was originally the ALJ assigned to this case and entered the Order for the independent medical examination. Before the regular hearing, the claim was reassigned to Jon L. Frobish.

contentions into consideration, he still believed that the November 1999 need for surgery had no relationship to the March 1999 accident.

After considering all this medical evidence, the ALJ determined "the opinion of Dr. Ebelke is the most complete and accurate."[7] The Board finds this determination to be well-founded. Claimant's complaints regarding her left shoulder and her neck are erratic and inconsistent. At any rate, Dr. Esch asked for authority to examine those complaints and he ruled out any myelopathy and radiculopathy. Had claimant believed more needed to be done, she could have requested further treatment under the method set forth in K.S.A. 1998 Supp. 44-534a. Moreover, it is clear from her own testimony that on November 16, 1999, claimant had a non-work-related event that caused her significant injury and led to the need for surgery. For these reasons, the Board must sustain the ALJ's Award in all respects.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Jon L. Frobish dated January 17, 2003, is affirmed.

IT IS SO ORDERED.

Dated this ____ day of October 2003.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Timothy A. Short, Attorney for Claimant
Leigh C. Hudson, Attorney for Respondent and its Insurance Carrier
Jon L. Frobish, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director

[7] Award at 3.